

THE NEW ZEALAND COURT OF APPEAL AND THE DOCTRINE OF STARE DECISIS

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I. INTRODUCTION

The role of the doctrine of stare decisis rose to prominence in the New Zealand Court of Appeal in 2003. In *Jones v Sky City Auckland Ltd*¹ the Court made a pronouncement on the current position of the doctrine in that Court. In the marginally earlier case of *Attorney-General v Ngati Apa*,² the Court refused to follow its prior decision in *In Re the Ninety Mile Beach*³ and did so in this very important case without any discussion of the doctrine of stare decisis. In addition, in October, the Supreme Court Bill passed its Third Reading in Parliament and received the Royal assent. With the establishment of the Supreme Court in New Zealand and the abolition of the right of appeal to the Judicial Committee of the Privy Council, sitting in London, the Court of Appeal in this country will occupy a position very different from the one it has traditionally occupied. In consequence, the establishment of the new Court is likely to have a significant impact on the doctrine of stare decisis in the Court of Appeal. This article traces the history of the doctrine in the New Zealand Court of Appeal and proffers comments on future directions.

II. THE IMPACT OF *YOUNG V BRISTOL AEROPLANE CO LTD*

In 1944 the English Court of Appeal pronounced clearly that it was bound by its own prior decisions. This was in *Young v Bristol Aeroplane Co Ltd*.⁴ In delivering the judgment of the Court, Lord Greene MR allowed for three exceptions to the rule that the Court is so bound by its own decisions. First, the Court may choose between two conflicting decisions of its own. Secondly, it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of the House of Lords. Thirdly, it is not bound to follow a decision of its own *given per incuriam*. This was affirmed by the House of Lords as a correct statement of the law when *Young v Bristol Aeroplane Co Ltd* went before it.⁵ *Young v Bristol Aeroplane Co Ltd* made its impact felt in New Zealand in 1947 when the New Zealand Court of Appeal considered it in *Re Rayner (Dec 'd), Daniell v Rayner*.⁶ The issue of stare decisis arose in *Re Rayner* because the Court of Appeal had to decide whether it was bound by its own decision in *Re Houghton*⁷ or whether it could overrule it, given that it was inconsistent with the decision of the House of Lords in *O'Grady v Wilmot*.⁸

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1 [2004] 1 NZLR 192.

2 [2003] 3 NZLR 643.

3 [1963] NZLR 461.

4 [1944] KB 718.

5 [1946] AC 163, 169.

6 [1948] NZLR 455.

7 [1945] NZLR 639.

8 [1916] 2 AC 231.

The matter was of such importance that both Divisions of the Court of Appeal sat, creating a Bench of seven judges.

Prior to *Re Rayner* the Court of Appeal had on a number of occasions held it could overrule its own prior decisions. Finlay J, delivering the leading judgment in *Re Rayner*, referred to *Hutchison v Ripeka te Peehi*,⁹ *R v Storey*¹⁰ (where it did not become necessary to decide the question) and *In re Rhodes, Barton v Moorhouse*.¹¹ Finlay J stated:

Having regard to the strength of the Court which pronounced the judgment in *Young v Bristol Aeroplane Co Ltd*, the acuteness and comprehensiveness of its analysis of all the preceding decisions, and the conclusiveness of its conclusions, the law in *Young v Bristol Aeroplane Co Ltd* is not likely to be departed from, and should be followed in this country.¹²

Finlay J found that the Court of Appeal had the authority to overrule *Re Houghton* on the ground of the exception in *Young v Bristol Aeroplane Co Ltd* that *Re Houghton* was inconsistent with a decision of the House of Lords¹³ or on the ground of the exception that *Re Houghton* was decided *per incuriam*.¹⁴

The case was finally decided by a majority of five to two, *Re Houghton* was overruled and *O'Grady v Wilmot* adopted. Of the majority, Finlay J was the only judge to undertake a full examination of the stare decisis question. Fair J, one of the minority judges, also gave full consideration to the doctrine of stare decisis. Fair J reached his decision on the substantive issue on the basis that the practice of drafting wills differed in England and New Zealand and therefore *O'Grady v Wilmot*¹⁵ was inapplicable in New Zealand. Having so decided, his comments on whether the Court of Appeal had the power to overrule its own prior decisions became obiter dicta, as he expressly acknowledged. Fair J was of the view that the Court of Appeal should be able to correct a decision of its own which is 'obviously erroneous'¹⁶ but he was critical of *Young v Bristol Aeroplane Co Ltd* and critical of Finlay J's approach that inconsistency with the House of Lords, or the High Court of Australia, would justify overruling a prior decision. Of the seven judges, only Finlay J and Fair J discussed this issue fully. The other judges who delivered full judgments and referred to the issue in their judgments, were of the view that the Court of Appeal should be able to overrule a prior decision that was wrongly decided but were not anxious to specify the circumstances in which prior decisions could be so overruled. *Re Rayner*, then, does not mirror the approach of the English Court of Appeal in *Young v Bristol Aeroplane Co Ltd*.

The combined effect of the judgments in *Re Rayner* is that the Court of Appeal is ordinarily bound by its own prior decisions but can overrule a prior decision where appropriate. Only Finlay J is definitive about the circumstances in which a prior decision can be overruled. The other judges refrain from enumerating specific categories.

9 [1919] NZLR 373.

10 [1931] NZLR 417.

11 [1933] NZLR 1348.

12 [1948] NZLR 455, 507.

13 Ibid.

14 Ibid.

15 [1948] NZLR 455, 478-

16 [1948] NZLR 455, 485.

III. THE POSITION OF THE COURT OF APPEAL IN NEW ZEALAND Fair J

makes a telling point in his judgment in *Re Rayner*. He states:

The Court of Appeal in New Zealand occupies a position in the judicial hierarchy which differs very materially from that of the Court of Appeal in England It consequently follows that the Court of Appeal is in effect, in nearly all cases, the final court in New Zealand.¹⁷

As Wood recently put it, the New Zealand Court of Appeal leads a 'schizophrenic existence as an intermediate appellate court in some areas, and as our final indigenous judicial body in other areas'.¹⁸ Both the English and New Zealand Courts of Appeal are intermediate appellate courts but the fact that New Zealand's ultimate court of appeal has traditionally sat thousands of miles away marks a major difference between them. It is not just a question of distance and associated expense.¹⁹ Privy Council decisions in New Zealand cases are usually very short. It is plain that, as a court, the Privy Council conducts itself in an error correction role, and refrains from exercising leadership in developing the common law of New Zealand.²⁰ The leadership role is left to the New Zealand Court of Appeal. Courts exercising this role today are not generally rigidly bound by their own prior decisions; the Privy Council has never been bound by its own prior decisions, the House of Lords has not been so bound since 1966 and the High Court of Australia is not so bound. From *Re Rayner* it is clear that the New Zealand Court of Appeal has always been aware of the difficulty of its being rigidly bound by its own prior decisions, given the unusual position it occupies for an intermediate appellate court.

IV. POST *RE RAYNER*

After *Re Rayner* the question of stare decisis arose again in *Preston v Preston*²¹ in 1955, in *Re Mans on*²² in 1964 and in *McFarlane v Sharp*²³ in 1972. In *Preston v Preston* North J stated:

It may well be necessary on some future occasion for this Court authoritatively to determine whether the Court of Appeal in New Zealand, in considering whether it is bound by its own previous decisions, should regard itself as governed exclusively by the principles laid down in *Young* [or whether they should be extended].²⁴

In *Re Manson*, in an effort to persuade the Court not to follow one of its prior decisions, substantial argument was put before the Court concerning whether *Young v Bristol Aeroplane Co Ltd* had been adopted in *Re Rayner*. McCarthy J, in delivering the judgment of the Court, acknowledged that the Court of Appeal in *Re Rayner* did not fully decide whether it should follow the practice of the English Court of Appeal in *Young v Bristol*

17 [1948] NZLR 455, 484-5.

18 N Wood, 'The Proposed Supreme Court and Precedent' [2003] *New Zealand Law Journal* 359.

19 Legal aid extends to appeals to the Privy Council.

20 This point was made by Professor J F Burrows in 2003 at a Canterbury District Law Society forum on the question of appeals to the Privy Council.

21 [1955] NZLR 1251.

22 [1964] NZLR 257.

23 [1972] NZLR 838.

24 [1955] NZLR 1251, 1259.

*Aeroplane Co Ltd*²⁵ and nor did it do so in *Preston v Preston*.²⁶ In *Re Manson* the Court of Appeal did not decide the point and did not overrule the prior decision under consideration.

In *McFarlane v Sharp*, counsel tried to persuade the Court not to follow a decision that had stood for seventy years. The Court of Appeal refused to do so and referred to the speech of Lord Reid in *Jones v Secretary of State*²⁷ in which he stated that he did not seek to categorise cases in which the power to depart from previous decisions should be used but ventured the opinion that the typical case for reconsidering an old decision is where some broad issue is involved and only in rare cases should there be a reconsideration of questions of construction of statutes or other documents.²⁸

V. THE 1980S AND 1990S

By the time New Zealand entered the 1980s it was clear that the Court of Appeal was ordinarily bound by its own prior decisions but this notwithstanding, the Court could overrule a prior decision if the need to do so arose. The precise circumstances in which it could depart from precedent were not clearly defined. The position was not necessarily the same as that stated for England in *Young v Bristol Aeroplane Co Ltd*. In 1986 *Collector of Customs v Lawrence Publishing Co Ltd*²⁹ came before the court. In this case Richardson J stated:

Since this Court was reconstituted in 1957 with permanent appellate judges it has not found it necessary to adopt a fixed rule as to the circumstances in which it will reconsider an earlier decision of the Court. Nor had it done so in the preceding period. In *Re Rayner* [1948] NZLR 455, although the Court with two divisions specially assembled and after full argument was asked to say that the rule in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 should be adopted, there was no firm pronouncement on the point... Seven years later in *Preston v Preston* [1955] NZLR 1251 the Court again left the matter open and in doing so presaged the possibility of a less rigid approach than had been expressed in *Young v Bristol Aeroplane Co Ltd*. See too *Re Manson* [1964] NZLR 257.³⁰

Richardson J went on to list a number of cases where the Court of Appeal, without any discussion of stare decisis, proceeded on the basis that it was entitled to review its earlier decisions. He then stated the position in terms that have been regarded as authoritative ever since:

This Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it should do so, but without attempting to categorise the classes of cases in which it will interfere.³¹

This statement encapsulates the practice of the Court from its inception. The language used is telling. Richardson J does not speak of the Court being 'bound', he says it will 'ordinarily follow' its earlier decisions. He then recognises that the Court does not wish to specify categories when it will do so. Elsewhere in the judgment he refers to 'a cautious willingness to review earlier decisions in what are perceived to be appropriate cases...'³²

²⁵ [1964] NZLR 257, 271.

²⁶ Ibid.

²⁷ [1972] AC 944.

²⁸ Ibid 966.

²⁹ [1986] 1 NZLR 404.

³⁰ Ibid 413.

³¹ Ibid 414.

³² Ibid.

In his judgment in the same case, Somers J states:

The boundaries of the doctrine of precedent in this Court are far from clear. It may be expected that the Court would be willing to review an earlier decision in the exceptional cases instanced in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. I think it likely to be the case too... that there are other and wider circumstances in which in New Zealand such a review may be undertaken... In this context it may be material that this Court is in almost all cases the Court of last resort for litigants.³³

In his last sentence Somers J echoes Fair J in *Re Rayner*.³⁴

McMullin J states that the Court of Appeal has 'in practice been reviewing earlier decisions on a case to case basis'.³⁵

In *Aratiki Properties Ltd v Craig*³⁶ Cooke P and McMullin J further explored the law as stated in *Collector of Customs v Lawrence Publishing Ltd*. Cooke P stated :

It remains to say something about the reliance by counsel for the Official Liquidator on *Collector of Customs v Lawrence Publishing Co Ltd*, especially as counsel indicated that on his understanding of the judgments in that case it was unnecessary for him to present any argument on stare decisis and that he had accordingly not prepared one.... Lest the understanding of *Lawrence's* case just mentioned is shared by others, it seems as well to say explicitly that, as pointed out in the judgments in that case, the question of the circumstances in which this Court should treat itself as free to depart from previous decisions of its own was not argued there. Indeed the judgment of Woodhouse P quoted an apparently unqualified admission by counsel for the Collector of Customs that previous decisions of the Court of Appeal were not binding on the Court of Appeal. While opinions and suggestions were expressed in varying degrees in the judgments delivered, it cannot be said that the case constitutes any definitive ruling on matters that were not argued. The case should not be construed as opening the door to attempts to unsettle existing precedents simply on the ground that they are alleged to be inconvenient or wrong. There are obviously occasions when, for instance, changed circumstances in New Zealand or new trends in overseas authorities will justify this court in undertaking a review of one of its own previous decisions. But no attempt to define such occasions would be appropriate in the present case, when we have heard no more argument on the subject than was heard in *Lawrence* itself.³⁷

McMullin J stated:

I wish only to make a few observations about the judgment delivered by members of this Court in *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404. In that case, in the absence of argument as to whether, and in what circumstances, this Court might review its own earlier decisions, I felt free for three reasons singular to the case and for a fourth and pragmatic one, to review an earlier decision of this Court in *Police v News Media Ownership Ltd* [1975] 1 NZLR 610. But in the face of what was said in the judgments of the minority in that case and what I said in my own judgment, it would be wrong to assume that this Court will be willing to depart from precedent which it has already laid down without argument justifying such a course. Only when proper argument to that end has been heard will the Court be able to attempt a review of an earlier decision.³⁸

In *Shing v Ashcroft*³⁹ Cooke P again acknowledged the power of the Court of Appeal to overrule one of its own decisions but commented:

Obviously the issue of precedent and, if found appropriate, the question whether this particular prior decision should be overruled ought not to be dealt with except by a Court of five.⁴⁰

33 Ibid 421-2.

34 Above n 17.

35 [1986] 1 NZLR 404, 417.

36 [1986] 2 NZLR 294.

37 Ibid 298.

38 Ibid 299.

39 [1987] 2 NZLR 154.

40 Ibid 157.

The need for a full Bench in order to overrule a prior decision has been a recurrent theme in the authorities in this country.

In *Dahya v Dahya*⁴¹ a full Court considered the circumstances in which it would depart from one of its prior decisions. As stated by Cooke P,⁴² this was the first time since *Re Manson*⁴³ that the Court had heard substantial argument on the matter.

Cooke P made three general observations.⁴⁴ First, the question must be one of practice, in which the experience of the Court and its view of the values sought in the administration of justice in New Zealand have some part to play. Secondly, it is important, especially for a small country such as New Zealand, that the national appellate court should hold itself free to take account of and benefit from decisions elsewhere in the English-speaking world. Thirdly, a Bench of five should be somewhat less reluctant to depart from a prior decision of the court than a Bench of three, especially if the prior decision was of a majority of two to one. The New Zealand courts should not abrogate the responsibility of trying to adjudicate on New Zealand justiciable problems. Richardson J quoted what he had said in *Collector of Customs v Lawrence Publishing Ltd.*⁴⁵ He went on to state that there are four reasons for departing from previous authority. The first is that any judicial change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in a particular case. The second is that the realities of parliamentary time preclude reliance on the development of legislation concerning all areas of law, or on the periodical reviewing of the whole body of case law on statutory provisions. The third is that the right of appeal with leave to the Privy Council is for practical purposes exercisable in only a minute fraction of New Zealand decisions. In addition, there is a natural hesitation on the part of the Privy Council to differ from the New Zealand Court of Appeal on matters of local practice, or on social issues.

The fourth and associated reason is that, in as much as our laws are designed to meet conditions and values in our society, the Court of Appeal must accept responsibility for the administration of the laws of New Zealand. Hardie Boys J agreed with Cooke P that the Court of Appeal must be free to depart from its own previous decision in an appropriate case. A good reason to depart from the previous decision must be shown, for example, that there is another conflicting decision of the Court; that the law has clearly developed differently in other highly persuasive jurisdictions; that social attitudes or practices in this country have changed; or that even without such factors the conviction that the earlier decision was wrong is shared by a substantial majority of the current membership of the Court. In *Cross v CIR*⁴⁶ Cooke P commented on *Dahya v Dahya*:

The question of departure by this Court from previous decisions of its own has recently been considered in *Dahya v Dahya* [1991] 2 NZLR 150. Something more is required to justify derogating from the important principle of stare decisis than a different opinion on a finely balanced point of statutory construction.⁴⁷

41 [1991] 2 NZLR 150.

42 Ibid 156.

43 Discussed I above: Part IV. Post *Re Rayner*.

44 [1991] 2 NZLR 150, 156-7.

45 Above n 31.

46 [1991] 3 NZLR 1.

47 Ibid 6.

In all of these cases we find the New Zealand Court of Appeal expressing itself as ordinarily bound by its own prior decisions but the real focus is not on being bound, but on when the Court may depart from such decisions. The Court is plainly reluctant to define precisely when it may do so. The question was amplified further in *R v Hines*.⁴⁸ In the joint judgment of Richardson P and Keith J, their Honours quote Richardson J's formulation in *Collector of Customs v Lawrence Publishing Ltd*⁴⁹ and they then make further comments. They state⁵⁰ that there are three considerations in determining whether it is appropriate for the courts 'to fashion a new rule'. First, the appropriateness of judicial review in any case will be influenced by the subject matter and its closeness to the Court's function. Second, in making value judgments the Court is seeking to apply underlying community values, not the judge's personal values. Third, whether the particular question is appropriate for judicial resolution:

The larger the public policy context, the less well equipped the Courts are to weigh the considerations involved and to attempt to resolve any moral quandaries and the less inclined they must be to intervene. That is particularly so where there are public policy ramifications affecting the bases of other relevant common law or statutory provisions. In short, where the consequences reach beyond the limits of the case and beyond a particular response to a particular issue.⁵¹

Blanchard J stated:

On the question of the review of its previous decisions this Court should adopt the position taken by Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 at pp414-415.⁵²

His Honour continued:

The appropriate policy on precedent for a (de facto) final appellate Court should mix caution and flexibility. This Court must not gain a reputation for easily being persuaded to depart from its earlier decisions. It has not done so over the past decade. That position must not change. On the other hand, when sitting as a Full Court it must have the freedom of action to be able to restate the law of New Zealand as changes in social conditions and legal developments in this country and elsewhere require. It ought not to fetter itself with rules about when earlier decisions may be departed from, as the English Court of Appeal, a truly intermediate Court, did in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.⁵³

In *Aoraki Corporation Ltd v McGavin*⁵⁴ the Court of Appeal overruled an earlier decision. Again, reference was made to Richardson J's words in *Collector of Customs v Lawrence Publishing Co Ltd*⁵⁵. This was an employment law case concerning redundancy. Thomas J dealt with the precedent question very shortly in his judgment:

I do not consider that the Court's decision to reconsider *Brighouse*⁵⁶ requires the extensive justification it receives in the main judgment. For myself, it is enough that no single ratio is discernible in the judgments of the majority and that the decision has proved controversial. To decline to review the decision would be to deny the law its social utility and capacity to develop.⁵⁷

48 [1997] 3 NZLR 529.

49 Above n 31.

50 *R v Hines* [1997] 3 NZLR 529, 538-9.

51 Ibid 539.

52 Ibid 587. See n 31. Gault and Thomas JJ were of the same view.

53 Ibid 587.

54 [1998] 3 NZLR 276.

55 Above n 31.

56 *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158.

57 Above n 54, 301.

VI. JONES V SKY CITY AUCKLAND LTD

The Court of Appeal entered the new millennium with a firm emphasis on the Court's power to depart from its own prior decisions.⁵⁸ *Re Rayner* had virtually ceased to be referred to in judgments concerned with the doctrine of stare decisis. Instead, the pronouncement of Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*⁵⁹ had come to represent the standard formulation on the subject.

The matter has now come before the Court of Appeal again, in *Jones v Sky City Auckland Ltd*.⁶⁰ In this case Keith J delivers the judgment of a full Court of five. The case concerns s67 of the *Casino Control Act 1990*. Under s67 a casino can make an order barring a person from entering the casino. Jones had an order made against him under s67 and challenged it in Court. Jones claimed that the power of exclusion under s67 is limited, particularly by reference to considerations of reasonableness, with an obligation on the licensee to give reasons for its action. The problem confronting Jones was that in *Sky City Auckland Ltd v Wu*,⁶¹ determined only in 2002, the Court of Appeal had held that holders of casino licences are entitled to exclude members of the public from the casino without assigning a reason so long as they do not act in breach of the *Human Rights Act 1993* or any other relevant legislation. In order to succeed, Jones had to overcome the decision in *Wu's* case. This led the Court to the doctrine of stare decisis as the Court had to address the question of when it could depart from, and overrule, its own prior decisions. In the event, the Court of Appeal could not find any ground for departing from its decision in *Wu's* case⁶² and Jones's appeal was dismissed. The interest of the judgment lies in what the Court of Appeal said about stare decisis. Keith J quotes Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*⁶³ but also offers his own formulation of the law governing this issue. He says:

While this Court can of course reconsider and overrule its own earlier decisions and it has not stated precise rules to regulate that action, our approach is cautious.⁶⁴

This wording is very interesting. There is no express mention of the Court being bound. Rather it is a formulation concerned with not being bound. This goes beyond Richardson J's formulation. Matters do not rest there, though. The real interest in stare decisis in the Court of Appeal today arises not from *Jones v Sky City Auckland Ltd* but from a case that preceded it in time by a narrow margin and which is notable because it was decided without a discussion of the doctrine. This case is *Attorney-General v Ngati Apa*.⁶⁵

58 In *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 the Privy Council in an appeal from the Court of Appeal of the West Indies Associated States Supreme Court pronounced that the rule in *Young v Bristol Aeroplane Co Ltd* applied generally to all intermediate appellate courts. In this respect the decision appears to be *per incuriam* as it overlooks contrary existing authority on the point. For a discussion, see G Orchard, 'Stare Decisis in the Court of Appeal' [1980] *New Zealand Law Journal* 380.

59 Above n 31.

60 [2004] 1 NZLR 192.

61 [2002] 3 NZLR 621.

62 *Jones v Sky City Auckland Ltd*, para 31.

63 Above n 31.

64 Above n 60, para 9.

65 [2003] 3 NZLR 643.

VII. ATTORNEY-GENERAL v NGATIAPA

Attorney-General v Ngati Apa is popularly known as 'the foreshore case'. In this case, the Court of Appeal was confronted with *In Re the Ninety-Mile Beach*.⁶⁶ In this prior decision the Court of Appeal had held that the Maori Land Court lacked jurisdiction to investigate and issue freehold titles on a claim to customary title to the foreshore. In the *Ngati Apa* case, the Court of Appeal reached the opposite result, holding that the Maori Land Court does have jurisdiction to determine the status - whether customary land or otherwise - of foreshore and seabed.

Given the decision in *In Re the Ninety-Mile Beach*, the question arises as to how the Court of Appeal was able to decide in this way. The *Ngati Apa* case holds that *In Re the Ninety-Mile Beach* is founded on a misunderstanding of the position of Maori customary title as law in this country. In consequence, *In Re the Ninety-Mile Beach* was wrongly decided. As Elias CJ put it:

In Re the Ninety-Mile Beach followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as "revolutionary".⁶⁷

In paragraph 87 the Chief Justice lists the authorities, including Commonwealth authorities, to which the reasoning in *In Re the Ninety-Mile Beach* is contrary and refers to a number of modern writers who have doubted the reasoning. She is particularly influenced by Sir Kenneth Roberts-Wray in his 1966 book, 'Commonwealth and Colonial Law'. Tipping J states:

The decision in *Ninety Mile Beach* has stood for forty years. Furthermore, it must have been regarded as correctly stating the law by those responsible for subsequent legislation. Hence a cautious approach should be taken to the suggestion that the case was wrongly decided. That said, I am driven to the conclusion that it was.⁶⁸

Elias CJ, Tipping J and Keith and Anderson JJ in a joint judgment, examine the authorities in detail in reaching their conclusion. None of the judges, however, discusses the significance of the doctrine of stare decisis for the Court in reaching its decision. It is a case of the kind referred to by Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*,⁶⁹ where the Court simply accepts that it is entitled to overrule a prior decision. The decision in the *Ngati Apa* case has given rise to major public controversy. There is no doubt that the Court has the power to overrule one of its own prior decisions. If *In Re the Ninety-Mile Beach* is wrongly decided, this is a clear ground for overruling it. Decisions reached *per incuriam* are one of the categories of exception recognised in *Young v Bristol Aeroplane Co Ltd*⁷⁰ and are expressly referred to in *Re Rayner*.⁷¹ Whether the case was wrongly decided, or whether the *Ngati Apa* decision is in fact a 'modern revision, based on developing insights since 1963', to

⁶⁶ [1963] NZLR 461.

⁶⁷ Above n 65, para 13.

⁶⁸ Above n 65, para 204.

⁶⁹ Above Part V. The 1980s and 1990s.

⁷⁰ Above n 4.

⁷¹ Above n 6.

use the Chief Justice's words,⁷² is another matter. As Elias CJ states in paragraph 25, 'Although the reasoning in *Wi Parata* was rejected by the Privy Council, it continued to influence thinking in New Zealand'. In any event, the *Ngati Apa* case appears to be an example of a case of the kind referred to by Richardson P and Keith J in *R v Hines*⁷³ which involves an issue that raises the question of whether it is one appropriate for judicial resolution. This would seem to be a case where change would have been more appropriately dealt with by the legislature. It is noteworthy that the decision in the *Ngati Apa* case appears likely to lead to legislation on the issue it decides, resulting from government concern for the ramifications of the decision throughout society.

VIII. HOUSE OF LORDS AND NEW ZEALAND COURT OF APPEAL COMPARED

Since 1966 the House of Lords has not been rigidly bound by its own prior decisions. As it stated in its Practice Statement of that year:

Their Lordships recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.⁷⁴

The House of Lords, an ultimate court of appeal, is not strictly bound by its own decisions but regards them as 'normally binding' and rarely departs from them. The New Zealand Court of Appeal, by comparison, will 'ordinarily follow'⁷⁵ its own prior decisions but will overrule a prior decision where appropriate. There is no practical difference between the two Courts in the way in which they address the matter of departing from their own prior decisions, although the Court of Appeal is only an intermediate appellate court, occupying in the New Zealand hierarchy of courts a position equivalent to that of the Court of Appeal in England, a Court that is bound by its own prior decisions within the terms of *Young v Bristol Aeroplane Co Ltd*. This is significant and reflects the fact that, although the New Zealand Court of Appeal is not an ultimate court of appeal, the circumstances of the appellate system in this country are such that it approximates one. These circumstances are about to change.

IX. THE SUPREME COURT OF NEW ZEALAND

On the 17th of October, 2003, the Supreme Court Bill received the Royal assent. The Act has a commencement date of the 1st of January 2004 and will come into full effect later in that year. The *Supreme Court Act 2003* abolishes the right of appeal in New Zealand to the Judicial Committee of the Privy Council and creates a Supreme Court to sit as the ultimate court of appeal in this country. The creation of this new Court raises important questions about the doctrine of stare decisis. In this respect the Court's first concern will be with whether it is to be bound by its own prior decisions. As an ultimate court of appeal, it is unlikely that it will be so bound. The Privy Council has never been bound by its own prior decisions and the

72 Above n 67.

73 Above n 50.

74 [1966] 3 All ER 77.

75 Above n 31.

House of Lords has not been so bound for virtually half a century. Beyond this, the Supreme Court will have to determine where it stands, relative to stare decisis, with regard to decisions of the Privy Council in New Zealand cases.

The process of replacing the Privy Council with a Supreme Court began with the Attorney-General establishing an Advisory Group to look in to the matter. The Report of the Advisory Group to the Attorney-General states, 'Privy Council decisions, made while the Privy Council was New Zealand's final appellate court, should normally be followed' but then states, 'However, the Supreme Court should be free to depart from existing authority when it appears right to do so.'⁷⁶

Presumably the Report is trying to say that the Supreme Court will be engaged in determining the law as it exists in this country. Decisions of the Privy Council may or may not be of use in this regard. The way that this matter has been dealt with in Australia may prove helpful here. The Privy Council was originally the ultimate court of appeal for Australia. This has not been the case now since 1986.⁷⁷ From the recent case of *Barns v Barns*,⁷⁸ it is plain that the High Court of Australia regards Privy Council decisions to be of persuasive authority only. As Barwick CJ put it in *Viro v The Queen*:

The essential basis for the observance of a tribunal by way of binding precedent is that the tribunal can correct the decisions of the Court which is said to be bound. This condition can no longer be satisfied in the case of this Court in relation to the Privy Council.⁷⁹

It would seem likely that this sort of reasoning would hold sway with New Zealand's Supreme Court.

Beyond these questions, there is the matter of the Court of Appeal. Once the Supreme Court has been established, the Court of Appeal will no longer occupy the position referred to by Fair J in *Re Rayner*.⁸⁰ Its position in New Zealand will no longer be, 'in effect, in nearly all cases, the final court in New Zealand'. This must have a significant impact on the doctrine of stare decisis in that Court. In England, when Lord Denning MR tried to free the Court of Appeal of the doctrine, the House of Lords firmly stated in *Davis v Johnson*⁸¹ that the Court of Appeal was bound by its own prior decisions, subject to the exceptions in *Young v Bristol Aeroplane Co Ltd*. With the advent of the Supreme Court there is no justification for the position as first stated by Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*,⁸² nor for that expressed by Keith J in *Jones v Sky City Auckland Ltd*.⁸³ These definitions are too imprecise for an intermediate appellate court, acting as an intermediate appellate court in the true sense. No doubt the Supreme Court will want to see the Court of Appeal bound by its own prior decisions, albeit while recognising the need for some exceptions. The categories of exception the Court of Appeal has been

76 Report of the Advisory Group to the Attorney-General, *Replacing the Privy Council: A New Supreme Court* (2002) para 48.

77 Appeals to the Privy Council from Australia were abolished in three stages: i) in 1968, ii) in 1975 and iii) in 1985-1986.

78 (2003) 196 ALR 65.

79 (1978) 141 CLR 88, 93.

80 Above n 17.

81 [1979] AC 264.

82 Above n 31.

83 Above n 64.

reluctant to define will need to be spelt out. It will be interesting to see if the categories are confined to those in *Young v Bristol Aeroplane Co Ltd*⁸⁴ or whether they will be broader. In any event, the emphasis will no doubt be on the Court of Appeal's being bound by its own prior decisions, not, as at present, on when it may depart from them.

X. CONCLUSION

The position of the Court of Appeal in this country has always been a difficult one with regard to the doctrine of stare decisis. Although it is an intermediate appellate court, the fact that New Zealand's ultimate court of appeal, the Judicial Committee of the Privy Council, sits twelve thousand miles away, has placed it in a position distinct from its equivalent in England. As Fair J put it, the New Zealand Court of Appeal, 'is in effect, in nearly all cases, the final Court in New Zealand.'⁸⁵ The establishment of the Supreme Court as the ultimate court of appeal for New Zealand changes the status of the Court of Appeal in this country. This change should lead to a precise definition of the effect of the doctrine of stare decisis on the Court of Appeal, such as never has been the case before. The focus of the significance of the doctrine in this country will shift from the Court of Appeal to the Supreme Court. Accordingly, the creation of the Supreme Court marks the beginning of a new era for the New Zealand Court of Appeal.

84 Since *Young v Bristol Aeroplane Co Ltd* was decided the question of further exceptions has remained controversial in England. There has been a particular need for extension of the exceptions in the Criminal Division of the English Court of Appeal. See the discussion in *R v Simpson* [2003] 3 All ER 531.

85 Above n 17.